

Decision 15-12-031 December 17, 2015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the alleged failure of TracFone Wireless, Inc. (U4321C) to collect and remit public purpose program surcharges and user fees on revenue from its sale of intrastate telephone service to California consumers, in violation of the laws, rules and regulations of this State; Order to Show Cause why Respondent should not immediately be ordered to pay all such outstanding sums plus interest, and be subject to penalties for such violations.

Investigation 09-12-016
(Filed December 17, 2009)

**DECISION APPROVING SETTLEMENT OF THE
SAFETY AND ENFORCEMENT DIVISION
AND TRACFONE WIRELESS, INC.**

Summary

This decision approves the settlement agreement between the California Public Utilities Commission Safety and Enforcement Division and TracFone Wireless, Inc. The settlement agreement resolves all outstanding issues in this Investigation and related court action concerning TracFone's collection of public purpose program surcharges and user fees on intrastate revenue since 2000 and provides that TracFone shall pay a \$10 million penalty.

This decision finds the settlement will serve as an effective deterrence to further offenses and is reasonable in light of the entire record, consistent with law, and in the public interest.

1. Jurisdiction

Rule 5.1 of the Commission's Rules of Practice and Procedure¹ authorizes the Commission to institute an investigation on its own motion. On December 17, 2009, the Commission issued this investigation into the alleged failure of TracFone Wireless, Inc. (TracFone) to collect and remit user fees and public purpose program surcharges in violation of the laws, rules and regulations of this State. Pursuant to Ordering Paragraph 12 of this investigation, the Commission provided TracFone with notice of the issuance of this investigation on or about December 22, 2009.

2. Background and Procedural History

TracFone is a prepaid wireless carrier operating in California. To use its service, customers must purchase a TracFone handset and minutes. Minutes are purchased prior to use and can be purchased online, through the handset, or from a third-party retailer.

In order to fund important Commission programs, all telecommunications companies regulated by the Commission are required to pay user fees and public purpose program surcharges on all intrastate call revenue. Generally, user fees and public purpose program surcharges are collected from the end-user by the carrier and then remitted to the Commission. TracFone did not collect user fees (from 2004 through 2012) or public purpose program surcharges (from at least 2000 through 2012). For these same periods, TracFone did not remit user fees or public purpose program surcharges to the Commission.

¹ Title 20, California Code of Regulations (CCR), Rule 5.1. All further references to a Rule or Rules are to the Commission's Rules of Practice and Procedure, Title 20, CCR.

In 2009, the Commission initiated this investigation into TracFone's failure to pay user fees and public purpose program surcharges and whether TracFone should be ordered to remit to the Commission all outstanding sums for user fees and public purpose program surcharges plus interest and penalties.

The proceeding was bifurcated into two phases. In Phase 1, Decision (D.) 12-02-032, the Commission determined TracFone is a telephone corporation operating as a public utility in California and TracFone is required to pay user fees and public purpose program surcharges on all intrastate call revenue from the services TracFone provides in California. The issue of the amount, if any, of past due user fees and public purpose program surcharges, and penalties, was deferred to Phase 2.

On March 26, 2012, TracFone applied for rehearing of D.12-02-032 and requested an oral argument before the full Commission. It also filed a motion for stay of D.12-02-032. In D.12-10-018, the Commission denied TracFone's application for rehearing and motion for stay of D.12-02-032.

In Phase 2, the Commission determined in D.14-01-037 that TracFone owed a total of \$24,397, 441.17 for past due user fees and public purpose program surcharges, including interest. The Commission declined to impose penalties. TracFone paid to the Commission, under protest, the amount set by D.14-01-037, on or about February 14, 2014.

On February 21, 2014, TracFone applied to the Commission for rehearing of D.14-01-037. In D.15-05-032, issued May 15, 2015, the Commission denied TracFone's Application for Rehearing of D.14-01-037 (as modified) and re-opened the proceeding to issue a final decision comporting with the Commission's process for assessing penalties for violation or non-compliance with laws, Commission orders, decisions, directives, rules, and demands.

On June 15, 2015, TracFone filed a Petition for Writ of Review (Writ Petition) of D.14-01-037 and D.15-05-032 with the State of California, First District Court of Appeal (Case No. A.145397). The Writ Petition has been held in abeyance at the joint request of TracFone and the Commission.

3. The Settlement Agreement

Safety and Enforcement Division (SED) and TracFone (collectively, the “Parties”) filed their “All-Party Motion for Commission Adoption of Settlement” on September 4, 2015. The proposed Settlement Agreement (Agreement) is attached as Appendix A. The Agreement resolves all issues before this Commission of Investigation 09-12-016, the resulting decisions: D.12-02-032, D.12-10-018, D.14-01-037, and D.15-05-032, and the Writ Petition, Case No. A.145397, before the State of California, First District Court of Appeal.

The Agreement resolves all outstanding issues in this Investigation and related court action concerning TracFone’s collection of user fees and public purpose program surcharges on intrastate revenue since 2000 through 2012. The Agreement provides:

1. TracFone shall pay a \$10 million penalty within forty days of adoption of the Agreement by the Commission;
2. The payment will resolve all issues in any proceeding related to Investigation (I.) 09-12-016 and SED will not seek additional penalties or sanctions in any related proceeding (excepting a proceeding to enforce the Agreement);
3. SED will take no position and will not directly or indirectly support or oppose or seek to delay the Commission’s decision on the TracFone Advice Letter for designation of TracFone as an Eligible Telecommunications Carrier in the State of California;
4. Within forty days of Commission approval of the Agreement, TracFone will withdraw its Writ Petition; and,

5. Upon Commission approval of the Agreement, the Commission will close I.09-12-016.

The Parties contend the settlement is reasonable in light of the entire record, consistent with law, and in the public interest, because it finally resolves the proceedings and litigation which have been ongoing for over five years and which – following the Commission’s order of rehearing on penalties and TracFone’s Writ Petition – would continue.

4. Discussion

We have historically favored settlements as a means of resolving contested issues where the settlement is in the public interest, reasonable in light of the record, and consistent with law. As set forth below, the Agreement satisfies these criteria. Accordingly, we adopt the Agreement and close these proceedings.

4.1. Standard for Review of Settlements

Rule 12.1(d) of the Commission’s Rules of Practice and Procedure² provides: “The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.”

The Parties’ Agreement, however, is not only uncontested; it is presented as an “all-party settlement.” The procedural rules of Article 12 of the Commission’s Rules of Practice and Procedure requiring notice of a settlement conference and a settlement conference (Rule 12.1(b)) and comment (Rule 12.2) are waived when considering an all-party settlement.³

² Title 20, CCR, Rule 12.1(d).

³ See, D.07-03-048

The seminal Commission decision approving an all-party settlement is the 1992 decision in a San Diego Gas & Electric Company rate case, D.92-12-019. The Commission, in that decision, repeated its admonition that, “we do not delve deeply into the details of settlements and attempt to second-guess and re-evaluate each aspect of the settlement, so long as the settlements as a whole are reasonable and in the public interest...”⁴ Following this rationale, the Commission adopted four criteria for approval of an all-party settlement (in lieu of the application of predecessors to Rule 12): (a) that it “commands the unanimous sponsorship of all active parties to the instant proceeding;” (b) “that the sponsoring parties are fairly reflective of the affected interests;” (c) “that no term of the settlement contravenes statutory provisions or prior Commission decisions;” and (d) “that the settlement conveys to the Commission sufficient information to permit [the Commission] to discharge [its] future regulatory obligations with respect to the parties and their interests.”⁵

Additionally, the payment of a penalty, as is required by this settlement, must be reviewed. The Commission, in D.98-12-075 restated the principles for assessing fines:

The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims.

Effective deterrence creates an incentive for public utilities to avoid violations. Deterrence is particularly important against violations which could

⁴ *Re San Diego Gas & Electric Co.* D. 92-12-019, 46 CPUC 2d 538, 551 (1992); citing D.90-08-068, 37 CPUC 2d 346 (1990).

⁵ 46 CPUC 2d. at 550-551.

result in public harm, and particularly against those where severe consequences could result. To capture these ideas, the two general factors used by the Commission in setting fines are: (1) severity of the offense and (2) conduct of the utility. These help guide the Commission in setting fines which are proportionate to the violation.⁶

4.2. The Agreement is an All-Party Settlement

The Parties submit the Agreement is an uncontested “all-party” settlement. An all-party settlement must: (a) command the unanimous sponsorship of all active parties to the instant proceeding; (b) be sponsored by parties that are fairly reflective of the affected interests; (c) not contravene statutory provisions or prior Commission decisions; and (d) convey to the Commission sufficient information to permit [the Commission] to discharge [its] future regulatory obligations with respect to the parties and their interests.⁷

The Agreement meets these criteria.

4.2.1. The Settlement is Sponsored by All Active Parties

The Parties to this Agreement, SED and TracFone, were the only active parties in this proceeding. Although The Utility Reform Network (TURN) filed a Notice of Intent to Claim Intervenor Compensation on April 5, 2010, TURN was relatively inactive during the proceedings and has not submitted any opposition or response to the Parties’ Motion for Commission Adoption of Settlement.

In D.92-12-019, the failure of the California Energy Commission to join in sponsoring the settlement did not deprive the settlement of its “all-party” quality

⁶ *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates* D.98-12-075, 84 CPUC 2d 155, 182 (1998).

⁷ 46 CPUC 2d, at 550-551.

due to the California Energy Commission's limited role and purpose in the proceedings.⁸ Likewise, the failure of TURN to join in sponsoring this settlement does not deprive it of its all-party quality. Therefore, we conclude this Agreement commands the unanimous sponsorship of all active parties to this proceeding and is appropriately presented for our approval as an all-party settlement.

4.2.2. The Sponsoring Parties Represent the Affected Interests

The Commission held in D.92-12-019 that the sponsors of an all-party settlement must represent the affected interests:

As noted in our review of recent precedent, a critical factor in our decision to adopt a settlement is confidence that it commands broad support among participants fairly reflective of affected interests. Here we find that the settlement is sponsored by a range of parties ideally positioned to comment on the operation of the utility and ratepayer perception.⁹

The record reflects that this was a robustly litigated case, one where sharply divergent evidence and views of the evidence were presented. The unanimous recommendation of the Parties for the Commission to adopt the settlement convinces the Commission that the settlement is "fairly reflective of the affected interests" of the public.

⁸ 46 CPUC 2d, at 548, fn. 2.

⁹ *Id.*, at 554.

4.2.3. The Terms Do Not Contravene Statutes or Commission Decisions

The Settlement is consistent with prior Commission decisions, and specifically is consistent with the prior decisions issued in this proceeding. In D.15-05-032 and D.14-01-037, as modified, we required the final decision comport our process for assessing penalties, including our established standards set forth in D.98-12-075.

The principles established in D.98-12-075 apply in proceedings where the Commission determines that a civil fine under § 2107 is appropriate for violation or non-compliance with laws, Commission orders, decisions, directives, rules, and demands. As analyzed below, the Settlement by the Parties to resolve these proceedings by TracFone's payment of a \$10 million penalty is consistent with D.15-05-032 and D.14-01-037, as modified, is consistent with the Commission's process for assessing penalties, and does not contravene any statutory provisions or prior Commission decisions.

4.2.4. Sufficient Information is Provided for Future Commission Action

An all-party settlement must provide sufficient information for the Commission to be able to discharge future regulatory obligations with respect to the parties and their interests and obligations.

The terms of the Agreement require TracFone pay a penalty of \$10 million which will resolve all proceedings related to I.09-12-016, including the Writ Petition, and will enable TracFone to move forward in good standing on all matters before the Commission. The Commission's regulatory obligations shall then continue unimpeded by continuing proceedings or litigation.

4.3. The Penalty is Reasonable and Proportionate to the Violation

The Order Instituting Investigation, I.09-12-016, at 7, inquires whether TracFone should be “fined for its violation of California law requiring timely remittance of such fees and surcharges.” We found in Phase 1, TracFone is required to pay user fees and public purpose program surcharges on all intrastate call revenue from the services TracFone provides in California and acted unlawfully in failing to comply with these requirements. We found in Phase 2, TracFone owed a total of \$24,397, 441.17 for past due user fees and public purpose program surcharges, including interest.

The prior decisions in this proceeding found TracFone liable for unpaid user fees and public purpose program surcharges. Having found TracFone in violation of law, Public Utilities Code § 2107 provides for a monetary penalty:

Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense.

For continuing violations, Public Utilities Code § 2108 states that each day is a “separate and distinct offense.” Civil monetary fines under § 2107 range from a minimum of \$500 per violation to a maximum of \$50,000 per violation. During nearly the entire time that TracFone failed and refused to remit public purpose program surcharges, however, the fines under § 2107 ranged from \$500 to \$20,000. (The amount was increased to \$50,000 per violation on January 1, 2012.) Pursuant to § 2105, “[a]ll penalties accruing under this part shall be cumulative” SED alleges the amount of time that TracFone violated

the CASF provisions was 1,515 days; and approximately 4,437 days for each of the other surcharge provisions.¹⁰

TracFone has agreed to pay \$10 million to the general fund as a term of the Settlement. Approval of the Agreement requires the Commission determine this payment is reasonable. When the Commission imposes a monetary fine under Section 2107 it uses principles identified by D.98-12-075 to assess whether the amount is appropriate.¹¹ As we have explained:

The Commission has considerable discretion, once it has established a violation, to weigh competing factors and select a point within that range. . . .¹²

Notably,

The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims.¹³

When a fine is assessed under Section 2107, two key factors are to be considered to ensure the penalty is an effective deterrence.

Effective deterrence creates an incentive for public utilities to avoid violations. Deterrence is particularly important against violations which could result in public harm, and particularly against those where severe consequences could result. To capture these ideas, the two general factors used by the Commission when setting fines are: (1) severity of offense and (2) conduct of the utility.¹⁴

¹⁰ Exhibit CPSD-17 at 8.

¹¹ 84 CPUC 2d at 182-184.

¹² D.03-01-087 at 9-11.

¹³ 84 CPUC 2d at 182.

¹⁴ *Ibid.*

The severity of the offense includes consideration of whether it caused economic harm, physical harm, or harm to the regulatory process. As we have held:

Many potential penalty cases before the Commission do not involve any harm to consumers but are instead violations of reporting or compliance requirements. In these cases, the harm may not be to consumers but rather to the integrity of the regulatory processes.

Such compliance with Commission directives is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.¹⁵

Considering the conduct of the utility “recognizes the important role of the public utility’s conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation.”¹⁶ “Effective deterrence also requires that the Commission recognize the financial resources of the utility in setting the fine . . .,”¹⁷ as well as the totality of the circumstances.

Setting a fine at a level which effectively deters further unlawful conduct by the subject utility and others requires that the Commission specifically tailor the package of sanctions, including any fine, to the unique facts of the case. The Commission will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.¹⁸

¹⁵ *Id.* at 183.

¹⁶ *Ibid.*

¹⁷ *Id.* at 184.

¹⁸ *Ibid.*

Lastly, the Commission must consider precedent, noting however, “The Commission adjudicates a wide range of cases which involve sanctions, many of which are cases of first impression.”¹⁹

Based on these criteria, Commission precedent, and a review of these proceedings, we conclude that the \$10 million penalty is reasonable. This penalty is substantial and appropriate in light of TracFone’s offense and conduct. TracFone’s offense was severe due to the potential for harm to the integrity of regulatory processes. TracFone’s conduct was persistent, lasting over several years. The penalty has been set at a level which should act as an effective deterrent to TracFone and others, but should not impact TracFone’s ability to continue providing service to its customer base.

4.4. The Settlement Should Be Approved

The Agreement meets our standard for approving all-party settlements. TracFone and SED, the settling parties, have had full opportunity to represent their respective interests and SED has represented the public interest and maintained the integrity of the Commission’s processes. As discussed above, the Agreement is consistent with prior Commission decisions and we are unaware of any conflict with other law. The Agreement’s terms detail TracFone’s penalty and settlement obligations and how it is to discharge them. It resolves all outstanding issues in this Investigation and related court action concerning TracFone’s collection of public purpose program surcharges and user fees on intrastate revenue since 2000 and provides TracFone shall pay a \$10 million penalty which is reasonable and proportionate to the offense.

¹⁹ *Ibid.*

The Parties request that the Agreement be adopted as a whole and without modification shall be granted. We find the Agreement is in the public interest, will serve as an effective deterrence to further offenses, is reasonable in light of the record as a whole, and is consistent with law. Therefore, we conclude the Parties' all-party motion should be granted and the Agreement should be approved.

5. Categorization and Need for Hearing

The Order Instituting Investigation categorized this proceeding as adjudicatory and determined that hearings might be required. Although hearings have been held during earlier phases in the proceedings, following the reopening of the proceedings no hearings have been held and given the filing of the uncontested, all-party settlement, we find that no hearings are needed to resolve this proceeding.

6. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Pursuant to § 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

7. Assignment of Proceeding

Michel P. Florio is the assigned Commissioner and Maribeth A. Bushey is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. TracFone and SED have entered into a voluntary settlement to resolve all pending issues.
2. TracFone and SED are the only active parties.
3. The active parties fairly reflect the interests affected by this proceeding.

4. No term of the parties' Agreement contravenes prior Commission decisions or other law.
5. The terms of the Agreement are reasonable given the record and the Commission's resolution of prior matters.
6. The terms of the Agreement are consistent with the public interest and should serve as a deterrent to similar conduct and offenses.
7. The Agreement is unopposed.
8. No hearing is necessary on the Agreement or this resolution of I.09-12-016.

Conclusions of Law

1. The Agreement is an uncontested agreement as defined in Rule 12.1(d) of the Commission's Rules of Practice and Procedure and is an all-party settlement under *San Diego Gas & Electric*, D.92-12-019. The proposed settlement satisfies the requirements of Rule 12.1(d) and D.92-12-019.
2. The procedural rules of Article 12 of the Commission's Rules of Practice and Procedure requiring notice of a settlement conference and a settlement conference (Rule 12.1(b)) and comment (Rule 12.2) are waived for consideration of this all-party settlement.
3. The Agreement is reasonable in light of the whole record, consistent with law, and in the public interest.
4. The parties' motion for adoption of the Agreement should be granted and the Agreement should be approved.
5. This decision should be made effective immediately to provide certainty regarding resolution of these proceedings and to enable TracFone and SED to implement the Agreement without delay.
6. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. The September 4, 2015 *All-Party Motion for Commission Adoption of Settlement*, is granted and the Settlement Agreement, appended to today's decision as Appendix A, is approved.
2. The parties must comply with all provisions of the Settlement Agreement.
3. No later than forty days of the effective date of this order, TracFone Wireless, Inc. must pay a \$10 million penalty by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, San Francisco, CA 94102. TracFone Wireless, Inc. shall write on the face of the check or money order "For deposit to the General Fund per Decision 15-12-031."
4. No later than forty days of the effective date of this order, TracFone Wireless, Inc. will withdraw its Writ Petition, Case No. A.145397, before the State of California, First District Court of Appeal.
5. Investigation 09-12-016 is closed.

This order is effective today.

Dated December 17, 2015, at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

LIANE M. RANDOLPH

Commissioners

ATTACHMENT A

**Settlement Agreement of Outstanding Matters in
Commission Investigation 09-12-016**